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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. KEJUAN RAYSHAWN BEAVER, Defendant and Appellant.	B268502 (Los Angeles County Super. Ct. No. TA137770)

APPEAL from the judgment of the Superior Court of Los Angeles County. Michael J. Shultz, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Idan Ivre and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Kejuan Rayshawn Beaver was convicted by jury of one count of second degree robbery. He contends the trial court committed reversible error by failing to instruct sua sponte on the lesser included offense of theft. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At 3:00 a.m. on April 15, 2015, S.C. was walking along Long Beach Boulevard in the city of Compton. Two men approached her from behind and told her to give them her money. When she looked at them, she saw the barrel of a gun inside the jacket of one of the men. S.C. said she did not have any money, and the man with the gun called her a liar. He also snatched her phone from her hand. Walking behind her, he forced her to walk across the street toward a parked car. He said he was going to search her for money because he did not believe she did not have any on her. S.C. was "terrified."

A truck drove by and the man with the gun told her to try to "catch a trick" to earn some money, but the truck kept driving and did not stop. The man then told her to "call your dude and tell him you got a new n---a now." S.C. had a second cell phone which she used for calls. The one the man had already snatched away she used just for listening to music. S.C. called her boyfriend and said that some guy on the street was trying to kidnap her. The man with the gun took the phone from her, and said "This Trigger P. I got your bitch. Come get her if you want to, but you're not gonna be able to find her." He then hung up and threw the phone over the fence they were standing next to on the street.

The man with the gun asked his accomplice if he "wanted" S.C., because he did not want her. At that point, S.C.'s boyfriend

drove up in his car. The two men jumped into their car and sped away. S.C. and her boyfriend followed them, trying to get the license plate number. She told her boyfriend not to get too close because one of the men had a gun, and then they heard gunshots and saw someone leaning out of the passenger side of the car shooting at them. After a brief chase, the car with the men in it crashed, and someone got out of the car and attempted shooting at them again. She and her boyfriend drove away from the scene and called 911. They told her to drive back to the scene and speak with the deputies who had arrived. S.C. gave a statement about what had occurred and identified two individuals shown to her in a field identification.

One of S.C.'s cell phones was found in the crashed vehicle and eventually returned to her. The deputies were unable to locate a gun at the crash scene.

Defendant was charged by information with second degree robbery (Pen. Code, § 212.5, subd. (c); count 1), shooting at an occupied vehicle (§ 246; count 2), and assault with a firearm (§ 245, subd. (a)(2); counts 3 and 4). It was also alleged defendant personally used a firearm in the commission of counts 1, 3 and 4, and had suffered two prior convictions for serious or violent felonies.

At trial, S.C. testified to the above facts. She explained that she was frightened to testify because a woman had approached her on the street, claiming to know defendant, and told her not to testify. She admitted she testified differently at the preliminary hearing because of her fear. She admitted she did not want to be testifying at trial, and acknowledged she had been arrested pursuant to a subpoena in order to ensure she testified. She said she was telling the truth "because it's just

time for me to get this over with. I'm tired of having it hangin' over my head." She said she was too frightened to look at defendant, but then agreed to do so and identified him as the man with the gun who robbed her.

On cross-examination, S.C. reiterated she never saw the "entire gun" during the robbery, just the barrel. Defendant never pulled the gun out or waived it around. She admitted that at the preliminary hearing she testified that she could not recall a gun being used or the faces of the men who robbed her; that their demeanor towards her was "very aggressive and rude"; that only one cell phone had been taken and not two; and that she could not recall speaking to deputies that day or what she actually reported because "I was really in shock."

The jury found defendant guilty of second degree robbery, and acquitted him on the remaining counts and found the firearm use allegation not true. In a separate proceeding, the court found one of defendant's prior convictions to be true, and sentenced defendant to a state prison term of 15 years.

This appeal followed.

DISCUSSION

Defendant contends the court erred by failing to instruct sua sponte on theft as a lesser included offense. We review claims of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.) We find no such error.

The court's obligation to instruct on all principles of law relevant to the issues raised by the evidence at trial includes the obligation to instruct " 'on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed.' [Citation.]" (*People v. Smith* (2013) 57 Cal.4th 232, 239; accord, *People v. Bradford*

(1997) 15 Cal.4th 1229, 1344-1345.) "An instruction on a lesser included offense *must be given only when the evidence warrants such an instruction*. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser included offense." (*People v. Mendoza* (2000) 24 Cal.4th 130, 174, italics added.)

Defendant argues the prosecution's evidence was weak, relying almost entirely on the testimony of the victim, S.C. Defendant contends S.C.'s trial testimony was contradicted by her preliminary hearing testimony, and that her description of the crime at the preliminary hearing amounted to no more than theft. Defendant argues the jury's not true finding on the firearm use allegation, and the acquittal on the other counts, suggest it did not find S.C.'s trial version of the crime entirely credible. He urges that the jury should have been instructed on theft given the contradictions in S.C.'s testimony and the lack of evidence that the taking of the cell phone was accomplished by force or fear.

S.C.'s testimony at trial unquestionably supports the jury's verdict of second degree robbery. She attested to being approached from behind by two men in the early morning hours, while she was all alone. They demanded her money and she saw that defendant had a gun concealed in his jacket. He snatched the cell phone from her hand, and demanded she solicit a trick to earn money for him. He then forced her to walk across the street toward his car. After she phoned her boyfriend which he demanded she do, he grabbed that phone from her as well and

told the boyfriend he may not find her if he came looking for her. S.C. testified that she was "terrified" by defendant's behavior.

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) "Theft is a necessarily included offense of robbery." (*People v. Ledesma* (2006) 39 Cal.4th 641, 715 (*Ledesma*).) The question here is whether the testimony of S.C. on cross-examination, in which she was impeached as to certain details of the incident, amounts to substantial evidence that the crime committed was only theft.

"It is not necessary that a robbery be accomplished by means of both force and fear [citations], as proof of either one is sufficient to sustain the conviction[.]" (*People v. James* (1963) 218 Cal.App.2d 166, 170.) " ' "The element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for [her] property." ' [Citation.] 'The extent of the victim's fear "do[es] not need to be extreme . . . ." ' [Citation.] '[T]he fear necessary for robbery is subjective in nature, requiring proof "that the victim was in fact afraid, and that such fear allowed the crime to be accomplished." ' [Citation.] 'Actual fear may be inferred from the circumstances, and need not be testified to explicitly by the victim.' [Citation.] ' " 'Where intimidation is relied upon, it [can] be established by proof of conduct, words, or circumstances reasonably calculated to produce fear.' " ' [Citations.]" (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1319 (*Bordelon*); see also *People v. Morehead* (2011) 191 Cal.App.4th 765, 774-775.)

Use of a weapon, physical assaults or verbal threats of violence are not required to establish the requisite fear to support

robbery. (*Bordelon*, *supra*, 162 Cal.App.4th at p. 1320; see also *People v. Flynn* (2000) 77 Cal.App.4th 766, 771-772.) In *Bordelon*, the court rejected the defendant's claim the court should have instructed on theft as a lesser included offense, explaining "[w]hile there was no evidence that defendant used a weapon, assaulted [the victim], or verbally threatened her, '[s]uch factors . . . are not requisites for a finding of robbery.' [Citation.] Defendant's words and conduct—his pushing a customer aside, his escalating demands for the money—were reasonably calculated to intimidate [the victim], and her testimony established that she was in fact 'shocked' and 'traumatized' by his actions. The element of fear was proven here, and no instruction on mere theft was warranted." (*Bordelon,* at p. 1320.)

The preliminary hearing testimony introduced at trial established that defendant approached S.C. with another man while she walking alone in the early morning hours, that he was aggressive and rude, that he snatched her cell phone away from her, and that she was "in shock" afterward about the incident. S.C.'s preliminary hearing testimony demonstrated a robbery accomplished by fear and intimidation, similar to the victim in *Bordelon*. The evidence elicited on cross-examination is wholly insufficient to warrant an instruction on theft as a lesser included offense. (*Bordelon*, *supra*, 162 Cal.App.4th at p. 1320 [" '[T]he existence of "any evidence, no matter how weak" will not justify instructions on a lesser included offense.' "].)

In any event, the failure to instruct on theft was harmless by any standard. (*Ledesma*, *supra*, 39 Cal.4th at p. 716 ["An erroneous failure to instruct on a lesser included offense requires reversal of a conviction if, taking into account the entire record, it

appears ' "reasonably probable" ' the defendant would have obtained a more favorable outcome had the error not occurred."].)

Both descriptions of the incident by S.C., at trial and at the preliminary hearing, plainly demonstrated that defendant used fear and intimidation to commit a robbery. The fact the jury acquitted defendant on the firearm use allegation and the other counts does not establish it was error to not instruct with theft. Indeed, the jury was instructed with CALCRIM No. 318 which reads: "You have heard evidence of [a] statement[s] that a witness made before the trial. If you decide that the witness made (that/those) statement[s], you may use (that/those) statement[s] in two ways: [¶] 1. To evaluate whether the witness's testimony in court is believable; [¶] AND [¶] 2. As evidence that the information in (that/those) earlier statement[s] is true." The jury's verdict suggests it took this instruction seriously in evaluating S.C.'s testimony, carefully considered the evidence, and found that the consistent aspects of S.C.'s testimony unequivocally supported a guilty verdict on the robbery charge. In our view, there is no reasonable probability that defendant would have obtained a more favorable outcome had the jury been instructed with theft as a lesser included offense.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P.J. FLIER, J.